Supreme Court, U.S.
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No. 00-674

IN THE

Supreme Court of the United States

LINDA JONES,

Petitioner,

v.

BAYER CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Bayer Corporation is a wholly owned subsidiary of Bayer AG.

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STATEMENT OF THE CASE[1]

Petitioner was hired by Bayer Corporation (hereinafter "Bayer") on May 31, 1991 as a pharmaceutical sales representative ("PSR"). Petitioner was hired by a Division Sales Manager ("DSM"), George Stamboulieh ("Stamboulieh"), after several interviews with both Stamboulieh and his direct-line manager, Regional Sales Manager ("RSM") Bill Corley ("Corley"). In January 1993, Petitioner was proposed for a promotion from PSR to PSR I. (R-27, ¶ 10). The promotion was approved by Corley and Human Resources and became effective on April 1, 1993. (R-31, p. 66).[2]

During the time that Corley was the RSM for the Memphis region and Stamboulieh was the DSM for the Jackson division, Petitioner never advised Corley, Stamboulieh, or anyone else of an interest in a promotion. (R-28, Corley Aff., ¶ 18; R-27, Stamboulieh Aff., ¶ 18). Petitioner told Stamboulieh that she was not interested in promotion into management. (R-31, Stamboulieh Depo., p. 152).

The Bayer sales force was reorganized January 1, 1995, and Corley was transferred from his position as RSM in

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1. In her Statement of the Case, pages 3-14, Petitioner has set forth a number of findings of fact which are wholly unsupported by the record and, in fact, are directly contradicted by the record in the case. The facts set forth herein are taken from findings of fact set forth in the U.S. Magistrate's Report and Recommendation. *See* Appendix to Petition for Writ of Certiorari.

2. This contradicts Petitioner's unsupported assertion that "she was not considered for promotions within her division." Pet. at 11.

February 1995. (R-31, Corley Depo., p. 61). Stamboulieh was transferred from his DSM position at approximately the same time. (R-27, Stamboulieh Aff., ¶ 12). Importantly, neither Corley nor Stamboulieh had any contact with Petitioner after they were transferred. (R-28, Corley Aff., ¶ 17; R-27, Stamboulieh Aff., ¶ 12).

After the reorganization and transfer of Stamboulieh and Corley, Petitioner was transferred into the division supervised by El Rosato (hereinafter "Rosato") in February-March 1995. Petitioner never had any problems with her new manager, Rosato, during her employment with Bayer. (R-32, Jones Depo., pp. 197-198).

From December 1991 to February 1996, Petitioner never advised any of her managers that she was interested in a promotion (R-32, Jones Depo., p. 90);[3] however, in February 1996, Petitioner advised Rosato of her interest in advancement opportunities with Bayer, including in the Biological Division.[4] (R-32, Jones Depo., p. 90). On or about

3. This directly contradicts Petitioner's bare assertion in her Petition that "[t]hroughout her career with the Respondent, Petitioner sought to move up into management . . . [and] let her desire for promotion be known, and tried to earn consideration." *See* Pet. at 6-7.

4. Pursuant to subpoena, on February 22, 1996, Petitioner gave a discovery deposition in a case styled *Kimberly Ridgeway v. Miles, Inc., et al.*, Case No. 93-3305-III, in the Chancery Court of Davidson County, Tennessee. Interestingly, in that deposition, Petitioner testified she was not interested in a promotion into management or Bayer's management training program because of concerns with the travel required, but that she would be interested in the future. (R-43, Jones Depo. in *Ridgeway* case, pp. 29-32). Petitioner gave testimony in *Ridgeway* which was critical of her "old" managers, Corley and Stamboulieh. Petitioner contends she suffered retaliation because of this testimony.

May 7, 1996, Petitioner interviewed for a Houston Biological position.[5] Petitioner was deficient in several of the core competencies set forth on the interview model; thus, it was determined that Petitioner was not the best qualified candidate for the position. (R-26, Guthrie Aff., ¶¶ 10, 12; R-25, Turner Aff., ¶¶ 9, 11).

Subsequent to this interview, Ms. Conder-Flanery, the South Central Business Area Director, became aware of Petitioner's interest in promotional opportunities. Ms. Conder-Flanery was also aware of concerns raised regarding Petitioner's interview skills and Petitioner's lack of concern for the impact Petitioner had on interviewers. (R-31, Conder-Flanery Depo., p. 15; R-31, Collins Depo., p. 82). Ms. Conder-Flanery set up a career development meeting with Petitioner and Ms. Collins from H.R. which occurred on June 28, 1996.[6] At that meeting, Ms. Conder-Flanery attempted to discuss Petitioner's development as a Bayer employee and career opportunities.

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5. At the time of Petitioner's interview for the Houston Biological Account Executive position, neither of the interviewers had any knowledge that Petitioner had given a deposition in the *Ridgeway* case or of Petitioner's substantive testimony in that deposition relating to males that Petitioner believed were unfairly promoted over her. (R-26, Guthrie Aff., ¶ 16; R-25, Turner Aff., ¶ 15).

6. Ms. Conder-Flanery was unaware of Petitioner's testimony in the *Ridgeway* case. (R-31, Conder-Flanery Depo., p. 42). Although Ms. Collins understood Petitioner had been deposed in the *Ridgeway* case, she had no knowledge of any of Petitioner's substantive testimony. (R-24, Collins Aff., ¶ 32). Prior to the career development meeting, Ms. Collins never discussed the fact that Petitioner had given a deposition with Ms. Conder-Flanery, Mr. Rosato, the interviewers for the Houston biologicals position, or any other Bayer employee. (R-24, Collins Aff., ¶ 33).

During the course of the meeting, Petitioner quit on three separate occasions and advised Ms. Conder-Flanery and Ms. Collins that she had another job elsewhere. (R-31, Conder-Flanery Depo., p. 31; R-31, Collins Depo., pp. 90-95; R-32, Jones Depo., pp. 108-109). Within two hours of the meeting, after Petitioner had "calmed down," Petitioner advised Bayer that she was interested in withdrawing her resignation. (R-32, Jones Depo., p. 109; R-31, Collins Depo., p. 102; Pet. at 14). On July 8, 1996, by memorandum from Ms. Collins, Petitioner was advised that her resignation was effective and that she would be closed out. (R-31, Collins Depo., p. 104).

On August 12, 1996, Petitioner filed a Charge of Discrimination with the Mississippi EEOC. All of Petitioner's complaints with regard to Stamboulieh and Corley occurred prior to the Bayer sales force reorganization of January 1995, which was more than 18 months before the filing of Petitioner's Mississippi EEOC charge. (R-28, Corley Aff., ¶ 17; R-27, Stamboulieh Aff., ¶ 12).

On August 25, 1996, Bayer ran an advertisement for one PSR position in the Columbus, Georgia territory; and on February 2, 1997, Bayer subsequently ran another advertisement for four PSR positions in the Atlanta territory. (R-30, Aff. of Harold Morgan, ¶ 4; R-29, Aff. of Cindy Green, ¶ 4). Petitioner was not considered as a candidate for these positions because her response to the advertisements was late, a review of responses to the ad had been completed and the interview process was almost complete.[7] (R-30, Morgan Aff., ¶ 7; R-29, Green Aff., ¶¶ 8, 9).

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7. Petitioner claims that she was not hired for PSR positions with Respondent and that "persons with far less qualifications were hired." (*See* Pet. at 14). This assertion is not supported by the record.

The interviewers for the Columbus and Atlanta positions did not know Petitioner, and both were unaware of any charge, grievance or complaint lodged by Petitioner with the Bayer Human Resources Department, the EEOC, or any other entity. (R-30, Morgan Aff., ¶ 8; R-29, Green Aff., ¶ 11). Furthermore, both interviewers were unaware that Petitioner had given a deposition in the *Ridgeway* case or of the substance of her testimony in that deposition. *Id.*

REASONS FOR DENYING THE WRIT

The Petition for Certiorari meets none of the criteria for review set forth in this Court's Rule 10. First, the Eleventh Circuit's decision is not in conflict with any decision of any other court of appeals. Second, the Petition does not present an important federal question and does not establish that the Eleventh Circuit's decision conflicts with a decision of a state court of last resort. Furthermore, there is no indication that the Eleventh Circuit has "departed from the accepted and usual course of judicial proceedings" so as "to call for an exercise of this Court's supervisory power . . ." *See* Supreme Court Rule 10.

The Petitioner merely asserts that the Court of Appeals for the Eleventh Circuit committed error in its factual findings and application of the law. The Petition raises no issues worthy of this Court's review. The Eleventh Circuit's ruling was proper in all respects, and Respondent Bayer respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.[8]

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8. While Petitioner set forth facts which related to her claims of retaliation in the District Court and at the Eleventh Circuit, Petitioner's "Questions Presented for Review" (*See* Pet. at i-ii) and

(Cont'd)

I.

THE PETITION SHOULD BE DENIED BECAUSE THE ELEVENTH CIRCUIT'S RULING RELATING TO THE 180 DAY RULE SET FORTH IN 42 U.S.C. § 2000e-5(e) DOES NOT CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES COURT OF APPEALS

The principal purpose for which this Court uses certiorari jurisdiction is to resolve conflicts among circuit courts of appeals and state courts concerning the meaning of provisions of federal law. *See Braxton v. United States*, 500 U.S. 344 (1991). "[O]rdinarily a court of appeals decision . . . will not be reviewed unless it conflicts with a decision of another court of appeals. This fact is a necessary concomitant of the limited capacity in this Court." *Hubbard v. United States*, 514 U.S. 695 (1995) (Rehnquist, J., O'Connor, J. and Souter, J. dissenting). The conflict must be a "real and embarrassing conflict of opinion between the Circuit Courts of Appeals." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387 (1923); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955).

The issue presented by the Petition relates to whether Petitioner's claims of sexual discrimination were time barred because the claims involved conduct occurring more than one hundred and eighty (180) days prior to the filing of a

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(Cont'd)
the argument set forth in "Reasons for Granting the Writ" (*See* Pet. at 14-22) are limited to the application of the 180 day rule set forth in 42 U.S.C. § 2000e-5(e). Respondent does not address Petitioner's abandoned retaliation claims as these were not raised as a basis for granting the Writ.

Charge of Discrimination. Importantly, the Petitioner has not asserted that the Eleventh Circuit Court of Appeals entered a decision in conflict with another United States court of appeals.[9] In fact, there is no legal conflict in the cases involving the 180 day limitation period set forth in 42 U.S.C. § 2000e-5(e).

The United States Courts of Appeals have consistently applied the statutory requirement that a complainant must file a charge of discrimination within 180 days of the incident. *See Equal Employment Opportunity Commission v. Green*, 76 F.3d 19 (1st Cir. 1996); *Tewksbury v. Ottaway Newspapers*, 192 F.3d 322 (2d Cir. 1999); *Churchill v. Star Enterprises*, 183 F.3d 184 (3d Cir. 1999); *Equal Employment Opportunity Commission v. South Carolina Nat'l Bank*, 562 F.2d 329 (4th Cir. 1977); *Rendon v. AT&T Technologies*, 883 F.2d 388 (5th Cir. 1989); *Hunter v. Westinghouse Elec. Corp.*, 616 F.2d 267 (6th Cir. 1980), *cert. denied*, 449 U.S. 889 (1980); *Simpson v. Borg-Warner Automotive, Inc.*, 196 F.3d 873 (7th Cir. 1999); *Shempert v. Harwick Chemical Corp.*, 151 F.3d 793 (8th Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999); *Davis v. Valley Distributing Co.*, 522 F.2d 827 (9th Cir. 1975), *cert. denied*, 429 U.S. 1090 (1977); *Gunnell v. Utah Valley State College*, 152 F.3d 1253 (10th Cir. 1998); *Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446 (11th Cir. 1993); *Washington v. Washington Metropolitan Area Transit Authority*, 160 F.3d 750 (D.C. Cir. 1998), *cert. denied*, 527 U.S. 1038 (1999). Likewise, this Court has also consistently recognized that a claim under Title VII must be based on conduct that occurred within 180 days of the date that the complainant filed her charge of discrimination with

9. Petitioner cites no statutory or case law authority for her argument that the 180 day rule was misapplied in this case. *See* Pet. at 15-17.

the Equal Employment Opportunity Commission. *See United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977); *Equal Employment Opportunity Commission v. Commercial Office Products Company*, 486 U.S. 107 (1988); *Kamberos v. GTE Automatic Electric, Inc.*, 454 U.S. 1060 (1981); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982).

The decision of the Eleventh Circuit Court of Appeals does not conflict with another circuit court of appeals; thus, the petition should be denied on this basis.

II.

THE PETITION SHOULD BE DENIED BECAUSE THIS CASE DOES NOT INVOLVE AN IMPORTANT FEDERAL QUESTION

The concept of importance relates to the importance of the issues to the public "as distinguished from that of the parties" involved. *See Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387 (1923); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955). Petitioner does not argue that this case involves an important federal question or has far-reaching implications. In truth, this case does not involve an important or novel federal question that merits review by this Court. The petition merely involves the factual and legal interpretation of 42 U.S.C. § 2000e-5(e) and sexual harassment laws, both of which have been interpreted consistently by the federal courts and by this Court; thus, the petition should be denied on this basis.

III.

THE PETITION SHOULD BE DENIED BECAUSE THE ONLY "ERROR" ASSERTED CONCERNS ISSUES OF FACT AND MISAPPLICATION OF A PROPERLY STATED RULE OF LAW

"A petition for certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10. This Court has stated: "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220 (1925). The Court of Appeals has the responsibility of assessing the record to determine whether the findings of the District Court are supported by the evidence, and this Court will not intervene unless the standard appears to have been "misapprehended or grossly misapplied." *Mobil Oil Corp. v. Federal Power Commission*, 417 U.S. 283 (1974).

A U.S. Magistrate, the District Court, and the Eleventh Circuit Court of Appeals have held that Petitioner's claims were time barred by 42 U.S.C. § 2000e-5(e) because there was no discrimination that occurred in the 180 day time period before Petitioner filed her Charge of Discrimination with the EEOC.

The facts and legal authority have been reviewed by three different factfinders, with the same finding from each court. Petitioner is, in essence, seeking a *de novo* review of the factual and legal findings of the Eleventh Circuit, which is not an appropriate basis for certiorari. Any ruling on the "fact-bound" issues raised in the Petition would have no, or at best limited, precedential value. The findings of the

Eleventh Circuit are clearly supported by the evidence, and the Eleventh Circuit has not misapplied the law; thus, the petition should be denied on this basis.

IV.

THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS IS CORRECT

Petitioner's argument concerns 42 U.S.C. § 2000e-5(e) which requires that a Charge of Discrimination be filed with the Equal Employment Opportunity Commission within 180 days of the act of discrimination. First, Petitioner argues that the 180 time limit does not apply to her because Bayer allegedly announced a "settlement"[10] with Petitioner and "revived the very same complaints and allegations after the 180-day period [had] expired."[11] Second, Petitioner argues that she is not time barred because the violations were continuing and constituted a "new act of sexual harassment" which occurred within the 180 day period. *See* Pet. at 15, 18.

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10. In fact, there was no "settlement" between Bayer and Petitioner, and Petitioner raises this contention for the first time in applying for a writ of certiorari. After receiving her interim performance evaluation for 1994, Petitioner requested a meeting to discuss her concerns with the evaluation. Ms. Collins, the Human Resources representative at the meeting, commemorated Petitioner's concerns in a memorandum. Neither the meeting nor the memorandum was a "settlement," and in fact, Ms. Collins concluded that the concerns set forth by Petitioner were almost frivolous. (R-31, Collins Depo., pp. 68-72).

11. Petitioner's contention that she revived the "very same complaints and allegations" is belied by her next assertion that the actions of Bayer within the 180 day time period were "new act[s] of sexual harassment." *See* Pet. at 15, 18.

Petitioner filed her Charge of Discrimination on August 12, 1996; thus, she was required to establish a specific act of discrimination that occurred between February 12, 1996 and August 12, 1996. Petitioner's complaints related to several isolated events that occurred in 1993 and 1994 that she says were unfair treatment because of her sex: (1) not receiving proper recognition for her performance in 1991 (R-32, Jones Depo., pp. 18-21); (2) not receiving a certain promotion in 1991 (R-32, Jones Depo., pp. 88-89); (3) being required to arrive and stay in a hotel, at Bayer's expense, the night before out-of-town sales meetings (R-32, Jones Depo., pp. 25, 28-30, 34); (4) being required to meet and build more positive relationships with her fellow sales representatives (R-32, Jones Depo., pp. 49-52); and (5) receiving a "downgraded" interim performance evaluation on July 18, 1994 (R-32, Jones Depo., pp. 173-175, 179-181). According to her own testimony, these alleged events occurred more than 180 days before she filed a Charge of Discrimination. Importantly, all of these charges of discrimination are attributed to Stamboulieh and Corley, each of whom ceased having any contact with Petitioner as of January-February 1995, a year and a half before her Charge was filed. (R-27, Stamboulieh Aff., ¶ 12; R-28, Corley Aff., ¶ 17). Therefore, as found by the U.S. Magistrate Court Judge, approved by the District Court, and affirmed by the Eleventh Circuit, these claims were time barred because they concern the conduct of Corley and Stamboulieh and occurred outside of the 180 day time period. *See* Pet. App. at 25-26.

In an effort to circumvent this time bar, Petitioner argues that subsequent actions of Bayer were "new" acts of sexual harassment and that these acts occurred within 180 days of her charge. *See* Pet. at 18. Petitioner contends that the acts

of Ms. Conder-Flanery and Ms. Collins, presumably in the career development meeting, were "new" and continuing acts of sexual harassment and that she was constructively discharged.

The Magistrate's Report and Recommendation squarely addressed this issue finding that Petitioner was not constructively discharged because she did not have "evidence of working conditions 'so difficult or unpleasant' as to force her resignation." *See* Pet. App. at 32-34. Furthermore, Petitioner quit during the meeting with Ms. Collins and Ms. Conder-Flanery, and Petitioner's failure to allow Bayer to respond to her concerns was "fatal" to her constructive discharge claim. *See* Pet. App. at 34; *see also Kilgore v. Thomson & Broch Management, Inc.*, 93 F.3d 752 (11th Cir. 1996). Thus, since there was no discriminatory conduct that occurred within the 180 day period before Petitioner filed her Charge of Discrimination, the Eleventh Circuit Court of Appeals was correct in affirming the District Court's judgment holding that Petitioner was time-barred from bringing a claim for discriminatory conduct.

CONCLUSION

The Petition for Certiorari fails to establish that Supreme Court review is necessary. "Review of a writ of certiorari is not a matter of right, but of judicial discretion." Supreme Court Rule 10. The Petition fails to establish that any of the criteria for grant of a writ have been met and, therefore, Respondent Bayer Corporation respectfully requests that the Court deny the Petition.

Respectfully submitted,

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